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BEFORE THE ARIZONA CORPORATION COMMISSION

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2008 MAY 22 A 9:15

AZ CORP COMMISSION  
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In the matter of:

RICK MCCULLOUGH, a single man  
individually and doing business as  
MCCULLOUGH INSURED INVESTMENTS

Docket No. S-20571A-07-0711

THE KODIAK INVESTMENT GROUP,  
LLC, an Arizona limited liability company

SECURITIES DIVISION'S MOTION TO  
ALLOW TELEPHONIC TESTIMONY

ANITA GENEVA MCCULLOUGH (a/k/a  
Anita G. Maestas, a single woman

Respondents.

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witness Dorothy Resler during the hearing of the above-referenced matter beginning on June 10, 2008. This request is submitted on the grounds that, although this individual can provide testimony that will provide key information at this administrative hearing, special circumstances prevent her actual appearance in Phoenix, Arizona during the course of this proceeding.

For this primary reason, and for others addressed in the following Memorandum of Points and Authorities, the Division's Motion to Allow Telephonic Testimony should be allowed.

Respectfully submitted this 22nd day of May, 2008.

By:

Rachel Strachan

Attorney for the Securities Division of the  
Arizona Corporation Commission

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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

The Division anticipates calling Dorothy Resler ("Resler") as a central witness to this hearing. This witness can offer probative testimony as to this case and, in so doing, she can provide evidence supporting a number of the allegations brought by the Division in this case. Although Resler resides in Phoenix, she is wheelchair-bound and does not have suitable transportation to travel to the hearing. As such, the burdensome task of traveling to 1200 West Washington in Phoenix to provide testimony in person is impractical.

This prospective witness offers highly probative evidence in this matter, yet faces an obstacle that prevents her appearance at this hearing. The simple and well-recognized solution to this problem is to allow for telephonic testimony. Through this manner, not only will relevant evidence be preserved and introduced, but all parties will have a full opportunity for questioning - whether by direct or cross-examination.

**II. ARGUMENT**

***A. Telephonic Testimony in Administrative Hearings is Supported Both  
Under Applicable Administrative Rules and Through Court Decisions.***

The purpose of administrative proceedings is to provide for the fair, speedy and cost effective resolution of administratively justiciable matters. To effectuate that purpose, the legislature provided for streamlined proceedings and relaxed application of the formal rules of evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of contested administrative cases. The evidence submitted in an administrative hearing need not rise to the level of formality required in a judicial proceeding, as long as it is "substantial, reliable and probative." In addition, the Commission promulgated rules of practice and procedure to ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,* A.A.C. R14-3-101(B); R14-3-109(K). Allowing Resler to testify by telephone retains all indicia of reliability and preserves Respondents' right to cross-examination.

1 Consistent with these administrative rules, courts have routinely acknowledged that  
2 telephonic testimony in administrative proceedings is permissible and consistent with the  
3 requirements of procedural due process. In *T.W.M. Custom Framing v. Industrial Commission of*  
4 *Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged an validity of an ALJ's  
5 judgment, partly on the fact that the ALJ had allowed an Industrial Commission witness to  
6 appear telephonically. The Court initially noted that telephonic testimony was superior to a mere  
7 transcription of testimony because the telephonic medium "preserves paralinguistic features such  
8 as pitch, intonation, and pauses that may assist the ALJ in making determinations of credibility."  
9 See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court then went on to recognize that "ALJs  
10 are not bound by formal rules of evidence or procedure and are charged with conducting the  
11 hearing in a manner that achieves substantial justice." *Id.* at 48, citing A.R.S. § 23-941(F).  
12 Based on these observations, the Court held that the telephonic testimony offered in this case was  
13 fully consistent with the requirement of "substantial justice."

14 Other courts have reached similar conclusions with respect to the use of telephonic  
15 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of*  
16 *Industrial Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was  
17 asked to review a trial court's determination that a hearing officer's admittance of an inspector's  
18 telephonic testimony violated C & C's due process rights and prejudiced C & C by preventing it  
19 from cross-examining the inspector's notes. The appellate court rejected the trial court's  
20 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative  
21 hearing of this nature need not be conducted according to the technical rules relating to evidence  
22 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court  
23 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*  
24 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the  
25 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings  
26 involving telephonic testimony as:

1           “a pragmatic solution, made possible by modern technology, which  
2           attempts to reconcile the problem of geographically separated adversaries  
3           with the core elements of a fair adversary hearing: the opportunity to  
4           cross-examine adverse witnesses and to rebut or explain unfavorable  
5           evidence.” *Id. at 251, 131 Cal.Rptr. at 422.*

6           Based on similar reasoning, a number of other state courts have recognized that, in the  
7           case of administrative and sometimes civil proceedings, telephonic testimony is permissible and  
8           consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*  
9           *Division, 72 Or. App. 486, 696 P.2d 19 (1985)* (court approved Oregon Employment Division’s  
10          procedure to conduct entire hearing telephonically; court found telephonic hearing fair if 1)  
11          parties have adequate opportunity to present and discuss evidence; 2) to cross-examine witnesses;  
12          and 3) the demeanor and credibility of the witnesses can be adequately judged.); *W.J.C. v.*  
13          *County of Vilas, 124 Wis. 2d 238, 369 N.W. 2d 162 (1985)* (court permitted telephonic expert  
14          testimony in commitment hearing). Ultimately, courts considering this issue have reached the  
15          conclusion that, at least in the case of administrative hearings, “fundamental fairness” is not  
16          compromised by permitting telephonic testimony.

17          The telephonic testimony request in the present case fits squarely within the tenor of these  
18          holdings. The Division is seeking to introduce the telephonic testimony of a witness who  
19          otherwise could not testify. The prospective testimony of Resler will be “substantial, reliable and  
20          probative,” and will meet all requirements of substantial justice. In other words, evidence  
21          bearing on the outcome of this trial will not be barred, and Respondents will still have every  
22          opportunity to question Resler about her testimony and/or any exhibits discussed.

23           **B.     *The Arizona Corporation Commission Has a Well-Recognized History of***  
24           ***Permitting Telephonic Testimony during the Course of Administrative***  
25           ***Hearings.***

26          In light of the relaxed evidentiary and procedural rules governing administrative hearings  
in this state, and because telephonic testimony does not jeopardize the fundamental fairness  
underlying these proceedings, this tribunal has repeatedly recognized and approved the use of  
telephonic testimony in administrative hearings to introduce probative evidence. This position

1 has been borne out of a number of previous hearings. *See, e.g., In the matter of Calumet Slag, et*  
2 *al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.  
3 03438A-00-0000; *In the matter of Edward Purvis, et al.*, Docket No. S-20482A-06-0631.

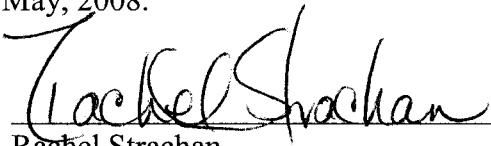
4 Only where telephonic testimony is the only available option does the Division seek leave  
5 to offer this form of testimony. Consistent with past determinations in this forum, leave to  
6 introduce the telephonic testimony of these prospective witnesses is warranted.

7 **III. CONCLUSION**

8 Permitting Dorothy Resler to testify telephonically at the upcoming administrative hearing  
9 allows the Division to present relevant witness evidence that is expected to be reliable and  
10 probative, is fundamentally fair and does not compromise Respondents' due process rights.  
11 Therefore, the Division respectfully requests that its motion for leave to present such telephonic  
12 testimony be granted.

13 Respectfully submitted this 22<sup>nd</sup> day of May, 2008.

14  
15 By:



16 Rachel Strachan

17 Attorney for the Securities Division of the  
18 Arizona Corporation Commission  
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1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
2 filed this 22nd day of May, 2008 with:

3 Docket Control  
4 Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, AZ 85007

5 COPY of the foregoing hand-delivered this  
6 22nd day of May, 2008 to:

7 Mr. Marc E. Stern  
8 Administrative Law Judge  
Arizona Corporation Commission/Hearing Division  
1200 W. Washington St.  
Phoenix, AZ 85007

9 COPY of the foregoing mailed this  
10 22nd day of May, 2008 to:

11 Anita Geneva McCullough  
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14 Rick McCullough  
15 4018 E. Melinda Lane  
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16 By: Veronica Sandoz  
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